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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1960

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and Rules involved	2
Statement	4
Summary of Argument	6
Argument	8
I. Introduction: The function of the writ of *habeas corpus ad prosequendum* and the issues in this case	8
II. Since the writ of *habeas corpus ad prosequendum* is a method of bringing a defendant before the district court for trial, district courts have jurisdiction to issue such writs to run anywhere within the jurisdiction of the United States.	16
III. The petitioner has no standing to challenge the authority of the district court to issue the writ in question	30
Conclusion	33

CITATIONS

Cases:

Adams v. *McCann*, 317 U.S. 269	8, 22
Ahrens v. *Clark*, 335 U.S. 188	7, 16, 17, 18
Albrecht v. *United States*, 273 U.S. 1	20
Biddle v. *Thiele*, 11 F. 2d 235	12, 19
Bollman, Ex Parte, 4 Cranch 75	16
Buchalter, United States ex rel. v. *Warden of Sing Sing Prison*, 141 F. 2d 259	31
Christian, In re, 82 Fed. 885	12, 19
Downey v. *United States*, 91 F. 2d 223	26
Edgerly v. *Kennelly*, 215 F. 2d 420, certiorari denied, 348 U.S. 938	29
Field v. *United States*, 193 F. 2d 86	11

Cases—Continued

	Page
Field v. *United States*, 193 F. 2d 92, certiorari dismissed, 342 U.S. 908	11
Goldberg v. *Hoffman*, 225 F. 2d 463	29
Hill v. *United States*, 186 F. 2d 669	19
Karol Van Collins, In the Matter of, 160 F. Supp. 165	29
MacNeil v. *Gray*, 158 F. Supp. 16	12
Mitchell v. *Dexter*, 244 Fed. 926	19
Moses, United States ex rel. v. *Kipp*, 232 F. 2d 147	19, 29
Palmer v. *Thompson*, 20 App. D.C. 273	19
Phillips v. *Hiatt*, 83 F. Supp. 935	29
Ponzi v. *Fessenden*, 258 U.S. 254	8, 16, 31
Price v. *Johnston*, 334 U.S. 266	8, 16, 23, 24
Rawls v. *United States*, 166 F. 2d 532, certiorari denied, 334 U.S. 848	31
Salinger, Ex Parte, 288 Fed. 752	12
Spellman, United States ex rel. v. *Murphy*, 217 F. 2d 247	31
Strewl v. *McGrath*, 191 F. 2d 347, certiorari denied, 343 U.S. 906	19
Taylor v. *McGrath*, 194 F. 2d 882	29
Taylor v. *Taintor*, 16 Wall. 366	6, 11, 13
Taylor v. *United States*, 238 F. 2d 259	19
Tom Tong, Ex Parte, 108 U.S. 556	17
United States, Ex Parte, 287 U.S. 241	9
United States v. *Hayman*, 342 U.S. 205	8, 16, 24, 25, 26, 27, 28
United States v. *John Kelso Co.*, 86 Fed. 304	20
United States v. *Kniess*, 251 F. 2d 669	29
United States v. *Standard Oil of Indiana*, 154 Fed. 728	20
Watkins, Ex Parte, 3 Pet. 193	17

Statutes and Rules:

R.S. 751, 752, 753 (28 U.S.C. (1940 ed.) 451-453)	18
18 U.S.C. 875	4
18 U.S.C. 1951	4
28 U.S.C. 1651	2, 8, 10, 15, 16, 22, 23, 25, 26, 27, 28, 30
28 U.S.C. 2241	2, 7, 15, 16, 17, 18, 29
28 U.S.C. 2255	8, 25, 26, 27, 28

Statutes—Continued

Page

Federal Rules of Civil Procedure:
Rule 4 27
Rule 45 27

Federal Rules of Criminal Procedure:
Rule 4 (c) (2) 3, 9, 12, 21, 22
Rule 9 (a) 3, 9, 10
Rule 17 (e) (1) 3, 21, 22
Rule 40 (b) 4, 10, 15

Miscellaneous:

IV Bacon's *Abridgement* (1852), p. 566 21
Black's *Law Dictionary* (4th ed.) 17, 19
III Blackstone's *Commentaries*, pp. 129-130 16
I Chitty's *Criminal Law* (1847), p. 132 21
H. Rep. 2646, 79th Cong., 2d Sess. 18
H. Rep. 308, 80th Cong., 1st Sess. 18

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OPINION BELOW

The opinion of the court of appeals (R. 24-29) is reported at 277 F. 2d 433.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1960. The petition for a writ of certiorari was filed on April 20, 1960, and was granted on May 31, 1960 (R. 44). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly refused to quash, at the instance of the petitioner, a writ of *habeas corpus ad prosequendum* issued by a district court, addressed to state custodial officials outside the district, ordering them to produce the petitioner, a state prisoner also outside the district, for trial in the federal district court.

STATUTES AND RULES INVOLVED

28 U.S.C. 1651 provides in pertinent part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * * *

28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * *

(c) The writ of habeas corpus shall not extend to prisoner unless:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or,

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Pertinent provisions of the Federal Rules of Criminal Procedure are as follows:

Rule 4 (c) (2):

The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

Rule 9 (a):

Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. * * *

Rule 17 (e) (1):

A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

Rule 40 (b):

(1) If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

* * * *

(3) * * * If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. * * * If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

STATEMENT

A ten-count indictment returned on September 22, 1959, in the District Court for the Southern District of California charged the petitioner and four others with extortion and conspiracy, in violation of 18 U.S.C. 875 and 1951 (R. 1-9). The petitioner was arrested in Baltimore, Maryland, where he posted bond returnable to the District Court for the Southern District of California sitting in Los Angeles. Prior

to appearing in Los Angeles, the petitioner pleaded guilty to three misdemeanor charges in New York City, and was sentenced to serve a two-year term of imprisonment and to pay a fine. The authorities at the New York City Prison honored a writ of *habeas corpus ad prosequendum* from the California district court, and the petitioner appeared before the district court there on December 2 and 8, 1959, where he pleaded not guilty to the indictment (R. 10, 11). The trial date was set for March 29, 1960, and the district court granted the petitioner's request to return to New York in order to obtain counsel (R. 11).

On March 16, 1960, the district court issued a writ of *habeas corpus ad prosequendum* to the Warden of the New York City Prison, directing that the petitioner be returned to Los Angeles for trial on March 29, 1960 (R. 19). The petitioner's motion to quash the writ was denied on the same day (R. 16-17, 20-21). On appeal, the court of appeals unanimously affirmed this order (R. 30). In view of the fact that the petitioner underwent a medical operation, the district court subsequently amended the return date of the writ to June 27, 1960, with the petitioner to be transported from New York to California after June 24 (Pet. App. "C" and "D"). The petitioner was scheduled to be tried with his co-defendants in the district court on July 12, 1960, but, in view of the grant of certiorari in this case, the trial has been postponed to February, 1961. The return date of the writ has been extended to January 28, 1961.

SUMMARY OF ARGUMENT

The sole question in this case is the jurisdiction of a district court to issue a writ of *habeas corpus ad prosequendum*, addressed to prison officials of a state outside the territorial limits of the federal judicial district of issuance, directing them to deliver for trial a prisoner held by them.

The function of such a writ is best considered against the normal procedure in a federal trial. Ordinarily, a person not in custody at the time he is indicted is served with a warrant of arrest which, under the present rules, may be served anywhere in the jurisdiction of the United States. If the place of arrest is more than 100 miles distant, the accused is entitled to a removal hearing, at which the sole contested issue, where there has been an indictment, is identity. The chief purpose of the removal procedure, where identity is not contested, is to inform the accused of his right to counsel and to fix bail for the appearance of the accused before the district of trial. The petitioner was accorded these rights in a removal hearing which occurred before he was in state custody.

Thereafter, in the normal case, the accused is under a duty to appear without further process of any kind. His failure to appear is a default of his bond, which is not necessarily excused because in the meantime he has been taken into state custody. *Taylor* v. *Taintor*, 16 Wall. 366. The writ of *habeas corpus ad prosequendum* serves the function of enabling the defendant to carry out his legal and contractual obli-

gation to appear for trial, without being adjudged in default of appearance. It is not really a substitute for process addressed to the defendant since the court has the right to assume that a defendant will do that which he is obligated to do, *i.e.*, appear for trial. It is merely the way in which the federal court obtains the consent of the state to the removal of the obstacle of state custody which would otherwise prevent a trial under the indictment.

The petitioner's argument that the writ may not be utilized when the petitioner is outside the district where it is issued is based on a supposed parallel to the issuance of a writ to inquire into the legality of detention; such a writ is restricted to the place of imprisonment under 28 U.S.C. 2241, as interpreted by this Court in *Ahrens* v. *Clark*, 335 U.S. 188. The difference between the use of the writ in that case and in this is that there the court has no basis for jurisdiction except the fact of the detention; the proceeding is in effect an independent civil action. Here, on the other hand, jurisdiction over the subject matter has already been established by the institution of the criminal proceeding with respect to an offense which occurred in the district. The writ is necessary to give effect to the pre-existing jurisdiction of the district court over that crime. Therefore, the writ is clearly "within the jurisdiction" of the district court issuing it, even though the petitioner was in New York.

This is the same type of jurisdiction outside the district exercised in serving arrest warrants and subpoenas, or as that exercised with respect to cor-

porate defendants in criminal cases even before adoption of the Rules of Criminal Procedure, or as that followed under the collateral review provisions of 28 U.S.C. 2255. Where the authority for such extra-territorial jurisdiction is not made clear by rule or statute, the courts have found it by construction (as in the interpretation of 28 U.S.C. 2255 in *United States* v. *Hayman*, 342 U.S. 205) or by reference to the all writs provision of 28 U.S.C. 1651 (*Adams* v. *McCann*, 317 U.S. 269; *Price* v. *Johnston*, 334 U.S. 266).

Moreover, the petitioner is not in a position to press an argument on the jurisdiction of the district court to issue the writ. He submitted to the jurisdiction of the court when he appeared, pleaded not guilty, and was permitted to return to New York to obtain counsel. At the present stage of the case, the writ is addressed to the New York authorities and it is a question between them and the federal court whether he should be returned to California for trial. The prisoner has no ground to complain if he is surrendered by one sovereign for trial by another. *Ponzi* v. *Fessenden*, 258 U.S. 254.

ARGUMENT

I

Introduction: The Function of the Writ of *Habeas Corpus Ad Prosequendum* and the Issues In This Case

The sole question raised by the petition for a writ of certiorari is the power of the District Court for the Southern District of California to bring before it

for trial a prisoner, held by New York custodial officials, by means of a writ of *habeas corpus ad prosequendum* which the prison officials, to whom it is addressed, have not contested. The petitioner does not challenge the power of the district court to try him on the indictment even though he is in state custody; nevertheless he, in effect, seeks to defeat that power by contesting the process by which the district court sought to, and did, obtain the consent of the state to enable him to carry out his legal obligation to appear for trial.[1]

The issue raised can best be understood when considered against the usual procedure for bringing a defendant to trial. In the usual case, where an indictment has been returned against a defendant not yet arrested, as in this case, a warrant of arrest issues as of right. Rule 9 (a), F. R. Crim. P. (*supra*, p. 3); see *Ex Parte United States*, 287 U.S. 241. The warrant may be executed at any place within the jurisdiction of the United States. Rule 4 (c) (2) (*supra*, p. 3). However, if a defendant is arrested more than 100 miles from the place of indictment, he is entitled to a removal hearing in the district where arrested. Where the arrest is made under an indictment, "a warrant of removal shall

[1] When the petitioner first moved to quash the writ, his allegation was that he was too ill to be transferred, but he chose to present this issue as a question of power to issue the writ, rather than a mere request for continuance of the trial because of illness. No issue as to the petitioner's ability to go to trial is now involved. The petitioner's trial has been postponed (see *supra* p. 5) and the sole issue is the validity of the writ—not the propriety of its exercise.

issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment." Rule 40 (b) (3), F. R. Crim. P. (*supra*, p. 4). In other words, the sole issue which may be contested on the removal hearing, where an indictment has been returned, is the identity of the defendant. The main purpose of the removal hearing, if identify is not contested, is to inform the defendant of his right to counsel and to admit him to bail, "for appearance in the district in which the prosecution is pending." Rule 40 (b) (3) (*supra*, p. 4). Thereafter, "the papers in the proceeding and any bail taken shall be transmitted mitted to the clerk of the district court in which the prosecution is pending." Rule 40 (b) (3) (*supra*, p. 4). These steps were followed as to the petitioner.

In the normal case, after a defendant has been admitted to bail under Rule 40, no further process is necessary. Having given a bond for appearance in the district of trial, a defendant appears before that court on the date set for arraignment and on the date of trial. If he does not appear, his bail is forfeited. Rule 46 (f) (1). In addition, by long practice, not specifically covered by the rules, the court of trial may issue a bench warrant for the apprehension of the defendant. The power to issue such warrants has been sustained under the "all writs statute", 28 U.S.C. 1651.[2] As Mr. Justice Reed said

[2] It probably could also be sustained as a new warrant on the indictment under Rule 9.

in ruling on an application for bail by bondsmen of certain defendants who did not appear for service of their sentence, in *Field* v. *United States*, 193 F. 2d 86, 90 (C.A. 2):

> District Courts of the United States have jurisdiction of all offenses against the laws of the United States. 18 U.S.C. § 3231. They "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied." Wayman v. Southard, 10 Wheat. 1, 23, 6 L.Ed. 253. Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed. There can be no doubt of the power of the court to direct the bench warrant for the arrest of the four fugitives from justice in the case of Dennis et als.

See also, to the same effect, *Field* v. *United States*, 193 F. 2d 92, 96 (C.A. 2), certiorari dismissed, 342 U.S. 908.

Where a defendant is in the custody of a state, he is in no position to carry out the obligation, which would normally be his, to appear on the date set for trial. His failure to appear is a default of his bond, which is not necessarily excused by reason of the fact that he is in custody. *Taylor* v. *Taintor*, 16 Wall. 366. It is therefore clear that the district court of

the district of trial would have the right to issue a bench warrant for his arrest which could be served anywhere within the jurisdiction of the United States under Rule 4. If the state authorities (in this case, the State of New York) chose to release petitioner under the warrant of arrest or chose to deliver petitioner to the custody of the federal marshal in New York, so that a warrant of arrest could be served, he would then be removed to California for trial.[3]

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[3] It is an open question whether, on arrest under such a warrant at a place more than 100 miles from the place of trial, a defendant would be entitled to a removal hearing. Even before Rule 4 made criminal process run throughout the United States, it had been held that the removal statute did not apply in such a situation and that the court had authority to require the prisoner to be brought directly to it wherever he was arrested. See *In re Christian*, 82 Fed. 885 (C.C. Ark.); *Biddle* v. *Thiele*, 11 F. 2d 235, 236 (C.A. 8); *contra*, *Palmer* v. *Thompson*, 20 App. D.C. 273; *Ex Parte Salinger*, 288 Fed. 752 (C.A. 2). The notes to the rules make it clear that the rules were intended to change the holding of *Palmer* v. *Thompson*, *supra*, that a warrant could be served only in the district where issued. However, since the rules do not deal explicitly with arrest of a defaulting defendant, there is no indication of intent with respect to the necessity of a removal hearing in that situation. The question does not appear to have arisen for determination since the time when Rule 4 made process run throughout the United States and the actual practice, so far as we have been able to determine it, has varied. The District Court of Massachusetts has held that, where a bench warrant issued after conviction, there was no occasion to bring the defendant before a Commissioner because the reasons for doing so [*i.e.*, notification of right to counsel and admission to bail] would not apply. *MacNeil* v. *Gray*, 158 F. Supp. 16 (D. Mass.). This same reasoning would apply to a default in appearance where a defendant has previously had a hearing under Rule 40. In any event, if such a hear-

The district courts have not customarily used a warrant of arrest in the situation where a defendant is known to be in state custody—they have used the writ of *habeas corpus ad prosequendum*, a historical writ known to the law at the time the American courts were established, which was used for the purpose of bringing a prisoner in custody before a court for trial. There is good reason, as well as historical precedent, for this practice. As noted, failure to appear on the date set for trial may work a forfeiture of the defendant's bond, even though his failure is due to custody by another jurisdiction. *Taylor* v. *Taintor*, 16 Wall. 366. It would hardly be fair either to the defendant or to his sureties to have him considered in default when he is willing to appear and the state is willing to let him appear. A court has the right to assume that a defendant is willing to do that which he is legally and contractually (under his bond) obligated to do—*i.e.*, appear for trial on the date set. There is thus no reason to issue a warrant of arrest addressed to the defendant before it is clear that the defendant is in willful default on his obligation. The obstacle to the defendant's carrying out of his obligation is his custody by the state jailer. It is therefore desirable that the court endeavor to remove that obstacle by obtaining the consent of the state to the release of the defendant so that he can carry out his obligation to appear

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ing were required, identity would obviously be the only issue since that is true even when a defendant is originally arrested on the indictment.

for trial. The historical way to do that is by a writ of *habeas corpus ad prosequendum*, which is addressed to the jailer rather than the defendant. A state which has a man in custody will not, of course, merely turn him loose to allow him to proceed to trial on his own. The state authorities will either transport him themselves or turn him over to the United States Marshal for transportation to the district of trial. But, in essence, the function of the writ is to enable a defendant to carry out his legal obligation despite his custody, without being adjudged in default of appearance.

Another reason why the writ *ad prosequendum* is a more desirable means of getting a defendant in state custody to his federal trial than would be the issuance of a bench warrant after default is that use of the writ is less likely to engender conflict between state and federal governments. Without endeavoring to decide what the ultimate decision would be if an issue were raised, it seems evident that an attempt to serve a federal warrant of arrest addressed to a defendant in custody of state prison officials would raise possibilities of conflict in our federal system. Presumably, a state could turn over a defendant to a federal marshal so that a warrant of arrest could be served on him there, but it may reasonably be anticipated that state officials will be less likely to release a defendant to federal authorities without some process addressed to the state, rather than the defendant, which will give the state the assurance that the prisoner will be returned to state custody when the federal trial is completed. The constitutional right

of a defendant to a speedy trial will not be aided if states become reluctant to turn over a defendant because federal courts have no authority to issue process to state custodians.

Neither a defendant[4] nor the administration of justice would gain from a ruling that the long established procedure of bringing a defendant to trial by writ of *habeas corpus ad prosequendum* is beyond the power of the district court. It is our position that such a ruling is not required. In criminal cases, a district court of the United States has jurisdiction throughout the United States for the purpose of bringing a defendant before it for trial. It therefore has power to issue a writ of *habeas corpus ad prosequendum* directed to any custodian anywhere within the United States. Such a writ is within its jurisdiction either under 28 U.S.C. 2241 or by virtue of the all writs statute, 28 U.S.C. 1651. It is also our position that, in any event, since the writ is both in name and in practical effect a process directed to the jailer and not to the defendant, the petitioner is in no position to challenge the writ if the state is willing to honor it.

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[4] The writ of *habeas corpus ad prosequendum* gives a defendant all the rights he would have under a bench warrant after default without the burden of an adjudication of default. This is so even if it is assumed that, under such a warrant, a defendant is entitled to a removal hearing under Rule 40 (see fn. 3, *supra*). As noted, the only issue in such a hearing is identity, and prison officials will not honor such a writ unless they are certain the person charged is the person they have.

II

Since the Writ of Habeas Corpus Ad Prosequendum Is a Method of Bringing a Defendant Before the District Court for Trial, District Courts Have Jurisdiction To Issue Such Writs To Run Anywhere Within the Jurisdiction of the United States.

The petitioner cannot, and does not, deny that district courts of the United States have authority to issue writs of *habeas corpus ad prosequendum* to run within their territorial limits. The writ is clearly one "agreeable to the usage and principles of law" under 28 U.S.C. 1651. It was mentioned by Blackstone (III Blackstone's *Commentaries*, 129-130); and was recognized by this Court as early as 1807 (*Ex Parte Bollman*, 4 Cranch 75, 97-98) and as recently as 1952 (*United States* v. *Hayman*, 342 U.S. 205, n. 35 at 221). See, also, *Price* v. *Johnston*, 334 U.S. 266, 281, and *Ponzi* v. *Fessenden*, 258 U.S. 254. Indeed, as petitioner points out, this use of the writ is recognized by 28 U.S.C. 2241 (c) (5), *supra*, pp. 2-3, which provides that the writ shall not issue with respect to a prisoner unless, as one alternative, it is necessary to bring him "into court to testify or for trial."

The petitioner's argument is a simple one: 28 U.S.C. 1651 (a) provides in pertinent part that writs of habeas corpus may be granted by district courts "within their respective jurisdictions" and the jurisdiction of the District Court for the Southern District of California does not extend to New York. He relies largely on *Ahrens* v. *Clark*, 335 U.S. 188, where this Court held, as to *the writ of habeas corpus ad*

subjiciendum,[5] that a district court had no authority to issue the writ in a situation where the defendant is confined outside its territorial jurisdiction. The petitioner argues that "jurisdiction" for the purposes of that writ recognized by 28 U.S.C. 2241 (c) (1) to (3) must necessarily be the same as "jurisdiction" for the purposes of the writ of *ad prosequendum* recognized by Section 2241 (c) (5).

The fallacy in the petitioner's argument is that Section 2241 (a) requires only that the writ be "within the jurisdiction" of the district court. Since the jurisdiction of district courts in criminal cases, both before the adoption of the Federal Rules of Criminal Procedure and even more after their adoption, is broader than it is in civil cases, the ruling in *Ahrens* v. *Clark* is not controlling here. A proceeding for a writ of *habeas corpus ad subjiciendum* is an independent action, *sui generis*, but civil in character. *Ex Parte Tom Tong*, 108 U.S. 556, 559-560; *Ex Parte Watkins*, 3 Pet. 193, 201-202. The jurisdiction of the district court depends on the applicant's presence within the district. The writ of *habeas corpus ad prosequendum*, on the other hand, is ancillary and auxiliary to pre-existing criminal jurisdiction in the

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[5] The courts have customarily distinguished the various uses to which writs of *habeas corpus* have been put by designating them by characteristic Latin words from the old forms of the writs. Thus, the most important use of the writ, to inquire into the legality of detention, is designated *ad faciendum, ad subjiciendum et recipiendum* (to submit to the court and receive its orders). Black's *Law Dictionary* (4th ed.), p. 837.

district court. It is process designed to secure the necessary physical custody over a prisoner in order to make effective the existing criminal jurisdiction of the court. Where a court already has jurisdiction of an existing cause of action, as here, it is "within" its jurisdiction, at least in criminal cases, to issue the writ as ancillary process whenever such issuance is "necessary or appropriate in aid of [its] jurisdiction." Nothing in *Ahrens* purports to limit the power of courts to issue ancillary process.

This conclusion is confirmed by the derivation of Section 2241 from R.S. 751, 752 and 753 (28 U.S.C. (1940 ed.) 451-453). Only R.S. 752, which was concerned with "writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty" (*habeas corpus ad subjiciendum*), contained the limiting phrase "within their respective jurisdictions" on which the decision in *Ahrens* in large part rested. R.S. 751, empowering the district courts to issue "writs of habeas corpus" generally, contained no such limitation, nor did R.S. 753, which, *inter alia*, permitted the issuance of the writ when "necessary to bring the prisoner into court to testify." The Reviser's Notes state that these provisions were consolidated into Section 2241 "with changes in phraseology necessary to effect the consolidation." See H. Rep. 2646, 79th Cong., 2d Sess., p. A169; H. Rep. 308, 80th Cong., 1st Sess., p. A177. There is no suggestion of any intention that, by the present language empowering judges to grant writs of habeas corpus generally "within their respective jurisdictions", the revisers intended to narrow the authority to issue ancil-

lary writs of habeas corpus, which had generally been assumed to extend outside the district.[6]

The jurisdiction of district courts in criminal cases, with respect to process necessary to bring a defendant before the court, was never as narrow as the petitioner would have it appear. It is true that, before the adoption of the Rules, conflicting views had been expressed as to whether district courts had power to issue warrants which would be effective beyond the territorial limits of the district. Cf. *Biddle* v. *Thiele*, 11 F. 2d 235 (C.A. 8), and *In re Christian*, 82 Fed. 885 (C.C. Ark.), with *Palmer* v. *Thompson*, 20 App. D.C. 273, and *Mitchell* v. *Dexter*, 244 Fed. 926 (C.A. 1). But the procedure for backing a warrant, *i.e.*, for having it reissued by the magistrate of the district where the warrant was to be executed by a police officer of that district, was part of the English practice in relation to justices of the peace (see Black's *Law Dictionary* (4th ed.), under "back", p. 175), and thus was part of generally known practice in criminal cases. And, even so, it may be noted, the court in the *Palmer* case expressed the view that a marshal in the district where a warrant issued might have authority to go outside his own district to effectuate an arrest where this was essential.

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[6] It has long been the practice for district courts to issue writs of *habeas corpus ad prosequendum* to state custodial officials beyond their territorial limits. See, *e.g.*, *Taylor* v. *United States*, 238 F. 2d 259, 260-261 (C.A. D.C.); *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147, 149-150 (C.A. 7); *Strewl* v. *McGrath*, 191 F. 2d 347 (C.A. D.C.), certiorari denied, 343 U.S. 906; *Hill* v. *United States*, 186 F. 2d 669, 670, 671 (C.A. 10).

What is more important is that, long before the adoption of the Rules, it was established that a district court of the United States, faced with the necessity of bringing a corporate defendant to trial, could issue a summons and have it served on the appropriate corporate officer, even though there was no statutory provision for such process, and even though the corporation was not doing business within the territorial limits of the district court. *United States* v. *John Kelso Co.*, 86 Fed. 304 (N.D. Cal.); *United States* v. *Standard Oil of Indiana*, 154 Fed. 728 (W.D. Tenn.). These cases and others to the same effect were noted with apparent approval by this Court in *Albrecht* v. *United States*, 273 U.S. 1, 8. The courts found the authority for such summons and its service in the all writs statute, reasoning that, in the absence of any statutory provision for obtaining jurisdiction over a corporate defendant, the court could resort to any appropriate means for that purpose. As the court said in *Kelso*, 86 Fed. at p. 307:[7]

> The court having general jurisdiction to try the defendant for its alleged violation of the law under consideration may, as a necessary incident to such jurisdiction, issue any appropriate writ for the purpose of bringing the defendant before it to answer to such charge. * * *

And again (86 Fed. at p. 308):

> It was necessary in the pending case that jurisdiction over the defendant should be acquired,

[7] This language was quoted with approval in the *Standard Oil* case, *supra*, in ruling on the right to serve a corporation outside the district.

> and, as Congress had made no specific provision as to the manner in which this should be done, the court had the right to resort to any appropriate method for that purpose. * * *

The Federal Rules of Criminal Procedure do not, as the petitioner argues, enlarge the jurisdiction of district courts in criminal cases. Rather, they embody and make explicit in certain defined situations the pre-existing view, exemplified by the corporate summons cases, that in criminal cases district courts of the United States may, agreeably to established usage, issue such process as is necessary to acquire jurisdiction of the defendant. Insofar as the Rules deal specifically with the most common means of bringing a person into court—warrant and subpoena—they make explicit the fact that criminal jurisdiction is to run throughout the United States. Rule 4 and Rule 17. But the fact that, as noted, the rules do not deal at all with the procedure to be followed to bring before the court a defendant who is in default of appearance does not mean that a district court of the United States is without jurisdiction to issue process necessary to bring before it for trial an indicted defendant who is in custody out of the territorial limits of the court. District courts of the United States have the authority, and hence the jurisdiction, to use established writs [8] when necessary to

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[8] There seems to be no question that in English practice, as it existed at the time of the Constitution, no problem of territorial limits could have been involved. Both I Chitty's *Criminal Law* (1847), p. 132, and IV Bacon's *Abridgement* (1852), p. 566, which refer, not to the writ *ad prosequendum*,

bring a defendant before them so that the courts can perform their duty of trying the indictment returned by a grand jury. The writ of *habeas corpus ad prosequendum* is a means of getting a defendant, who would otherwise be in default, before the court for trial. The same "jurisdiction" which permitted service on a corporate defendant, the same "jurisdiction" which is reflected in Rule 4 and Rule 17, applies to give the courts "jurisdiction" to issue the writ of habeas corpus to a custodian outside their territorial limits when that is necessary to bring a defendant to trial.

In *Adams* v. *McCann*, 317 U.S. 269, this Court, in holding that circuit courts of appeals possess the authority under Section 262 of the Judicial Code (now 28 U.S.C. 1651, *supra*) to issue writs of *habeas corpus ad subjiciendum* as auxiliary aids to existing appellate jurisdiction with respect to a pending matter, stated (317 U.S. at 273):

> Procedural instruments are means for achieving the rational ends of law. A Circuit Court of Appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted

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but to a similar writ, *deliberandum et recipiendum*, state that its purpose was to deliver a prisoner from one district to another, as from England to Ireland.

> to it. Undoubtedly, therefore, the Circuit Court of Appeals had "jurisdiction," in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. * * *

This Court subsequently construed Section 262 of the Judicial Code to permit courts of appeals to issue writs "in the nature of habeas corpus", in aid of existing appellate jurisdiction in a case, for the purpose of bringing up prisoners in order that they might argue their respective appeals before the circuit courts. *Price* v. *Johnston*, 334 U.S. 266, 279-283. In *Price*, this Court held that such a writ could be issued "where its use is calculated, in the sound judgment of the [court], to achieve the ends of justice entrusted to it", and that the mere fact that none of the common law writs of habeas corpus had been devised for the particular purpose of producing a prisoner to argue his appeal was immaterial; the all writs section was held to be not "an ossification of the practice and procedure of more than a century and a half ago", but, rather, "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Id.*, at 282. Moreover, the Court emphasized that "[t]he historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." *Id.*, at 283. These principles, which permitted the issuance of writs of *habeas corpus ad subjiciendum* and writs "in the nature of habeas corpus" as aids to the exercise of appellate (*i.e.*, subject matter) jurisdiction, clearly support use of the

writ of *habeas corpus ad prosequendum* at bar, which is in aid of the criminal subject matter jurisdiction of the district court over the crimes charged in the indictment.

It is significant that this Court, in *Price, supra*, did not suggest that there would be a lack of jurisdiction in the courts of appeals to issue the "writ in the nature of habeas corpus" there involved if the prisoner was confined outside of the territorial jurisdictions of the respective circuit courts, nor did this Court allude to the respective territorial jurisdictions of the circuit courts in providing that they possessed the authority to issue the writ there in question. Indeed, the broad language used by this Court in *Price, supra*, 334 U.S. at 279-283, 284, supports the notion that the writ in that case would be issuable outside of the territorial jurisdictions of the respective circuit courts, especially when it is noted that a prisoner is oftentimes removed to a federal penitentiary outside of the territorial jurisdiction of the circuit court while his appeal is pending in the circuit court.[9]

In *United States* v. *Hayman*, 342 U.S. 205, this Court upheld the power of district courts to issue orders for the production of prisoners confined outside of their respective territorial limits in proceed-

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[9] For example, District of Columbia prisoners confined in the Federal Penitentiary at Lorton, Virginia, are outside of the territorial jurisdiction of the Court of Appeals for the District of Columbia Circuit, in which court an appeal from a conviction in the District Court for the District of Columbia may be lodged.

ings pursuant to 28 U.S.C. 2255, stating (342 U.S. at 220-221):

> This is not a habeas corpus proceeding. The sentencing court in the Southern District of California would not be issuing an original writ of habeas corpus to secure respondent's presence from another district. Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that Section.
>
> The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law. * * *

That reasoning applies here. If the district courts are authorized to issue extraterritorial orders pursuant to Section 1651 for the production of prisoners in aid of their subject matter jurisdiction under Section 2255, so in criminal cases the district court is authorized under Section 1651 (the all writs provision) to aid its subject matter jurisdiction over the crimes charged in the indictment by issuing the

extraterritorial writ in question. See *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A. D.C.).

In each case, the extraterritorial process is designed to secure the presence of the prisoner before the court in aid of pre-existing subject matter jurisdiction. If this power stems from the fact the Section 2255 proceeding contemplates the presence of the prisoner in many instances, so here, to a greater degree, the indictment requires the presence of the petitioner. Hence, Section 1651 authorizes the issuance of extraterritorial process in aid of that criminal subject matter jurisdiction. No other conclusion from *Hayman* can logically be reached. The petitioner's claim that Section 2255 contains within itself the exception to the general rule as to territorial limitation (Pet. Br. 13) not only disregards the wording of 28 U.S.C. 2255, which does not provide for extraterritorial issuance of orders for the production of prisoners, but ignores the decision in *Hayman*, *supra*, that the district courts are not impotent to implement their 2255 jurisdiction by issuing extraterritorial orders for production of prisoners so long as they can invoke the provisions of Section 1651. True, Congress intended that the 2255 hearings, which might often necessitate the presence of the prisoner, would be conducted in the sentencing court. But Congress did not specifically provide in 28 U.S.C. 2255 for the issuance of extraterritorial orders for the production of prisoners in the sentencing courts. That authority was found by this Court in Section 1651. So here, Congress intended the petitioner to be tried and the Constitution gives him a right to a

speedy trial. The district court may therefore use Section 1651 in order to effectuate the trial. As the court below stated (277 F. 2d at 436), in reasoning from *Hayman, supra*, "We believe that in this case the District Court is not impotent to bring before it for trial a defendant who has been indicted by that Court, who has entered a plea of not guilty in that Court, and who at his request has gone to the State of New York, and whose presence is now required in the Southern District of California for the purpose of proceeding with the prosecution against him."

Moreover, the instant case is a much stronger one than *Hayman* in a number of respects:

(1) Issuance of an extraterritorial order for the production of a prisoner in a Section 2255 proceeding, which is civil in nature, is somewhat unusual in the light of the fact that process in civil proceedings is customarily more closely restricted. See Rules 4 and 45, F.R. Civ. Proc. In the instant case, the writ is issued in aid of criminal jurisdiction in a case before the court, and is analogous to an arrest warrant which runs throughout the United States. The writ of *habeas corpus ad prosequendum* and the arrest warrant serve the same function of securing physical custody over a defendant for the purpose of answering criminal charges in the district courts. Thus, the long standing practice of issuing writs of *habeas corpus ad prosequendum* to state custodians outside of the territorial jurisdiction of the district court comports more fully with the nationwide validity and effect of process issued by the district courts in aid of criminal subject matter jurisdiction.

(2) Issuance of the extraterritorial writ of *habeas corpus ad prosequendum* in the present case is more "necessary" than in *Hayman*. In a criminal proceeding, the court is powerless to proceed with the exercise of its jurisdiction unless the accused, whether produced in court by a writ of *habeas corpus ad prosequendum*, arrest warrant or otherwise, is physically present in court and in most cases, where the offense is committed in one district, there can be trial only in that district. In Section 2255 proceedings, however, the district court can oftentimes proceed to exercise its jurisdiction in a matter before it without the physical presence of the prisoner, and, to the extent that it cannot, there could be a remedy by habeas corpus in the district of confinement.

(3) The long-standing use of the writ of *habeas corpus ad prosequendum*, both in this country and England, serves to meet the requirement of Section 1651 that the writ be "agreeable to the usages and principles of law" even more clearly than does the extraterritorial order for the production of a prisoner in the relatively recent Section 2255 jurisdiction of the district courts.

(4) Finally, there is a greater need for issuance of extraterritorial process designed to secure the physical custody of a defendant in aid of criminal jurisdiction of the district courts than there is for issuance of extraterritorial orders for production of prisoners in Section 2255 proceedings. The prisoners in the Section 2255 proceedings have been legally convicted and have had opportunities for appellate review. In the instant case, however, the petitioner has not been

convicted in the District Court. He has a constitutional right to a speedy trial in the district where the alleged crime was committed. As explained above in Point I, *supra*, the writ is the most appropriate way of effectuating that right and bringing the defendant to trial.[10]

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[10] The petitioner's reliance on *Edgerly* v. *Kennelly*, 215 F. 2d 420 (C.A. 7), certiorari denied, 348 U.S. 938, and *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7), is misplaced. *Edgerly*, a civil suit for damages, in which the subpoena power is more limited, and *Goldberg*, a mandamus proceeding, are clearly unrelated to the present case where the writ *ad prosequendum*, similar to an arrest warrant which has nation-wide effect, was issued in aid of *criminal* jurisdiction. Moreover, the same circuit court, by holding that it would be a breach of comity and faith if the District Court for the Northern District of Illinois did not return a Michigan prisoner to the state authorities pursuant to representations made in a writ of *habeas corpus ad prosequendum* to the Michigan authorities, impliedly recognized the extra-territorial issuance of the writ of *habeas corpus ad prosequendum*. *United States ex rel. Moses* v. *Kipp*, 232 F.2d 147 (C.A. 7). Nor does *United States* v. *Kniess*, 251 F. 2d 669 (C.A. 7), help the petitioner. In that case, the court merely held that it lacked the authority to issue a writ of *habeas corpus ad subjiciendum* beyond its territorial jurisdiction. In *Taylor* v. *McGrath*, 194 F. 2d 882 (C.A. D.C.), on which the petitioner also relies, the court merely held that mandamus was not a substitute for habeas corpus, and that, in any event, the petitioner was not entitled to a writ of *habeas corpus ad subjiciendum* because he was outside of the court's territorial jurisdiction.

In *Phillips* v. *Hiatt*, 83 F. Supp. 935 (D. Del.), and *In the Matter of Karol Van Collins*, 160 F. Supp. 165 (D. Me.), federal prisoners, confined outside of the respective territorial jurisdictions of the district courts pursuant to other convictions, sought writs of *habeas corpus ad prosequendum* in the districts where indictments were then pending against them on other federal charges. In denying the relief requested, the district courts held that neither 28 U.S.C. 2241

III

The Petitioner Has No Standing To Challenge the Authority of the District Court To Issue the Writ In Question

As explained in Point I, *supra*, the function of the writ *ad prosequendum* is to enable a petitioner, who is in custody, to accomplish without default that which he is legally under a duty to do without further process of any kind, *i.e.*, appear for trial under an indictment to which he has pleaded not guilty. If a petitioner is not in jail, no process issues against him until after he has failed to appear. Hence the writ in this case, which is addressed to the custodian, and not to the petitioner, is not a substitute for process.[11] Under these circumstances, in our view, petitioner has no standing to challenge the power of the court to issue the writ to his custodian.[12]

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nor Section 1651, *supra*, conferred authority on them to issue the writs to run beyond their respective territorial jurisdictions. For all the reasons developed above, we believe the expressed bases for these decisions are wrong although they are factually distinguishable from the present case.

[11] In this respect, the writ *ad prosequendum* differs from a writ *ad testificandum* which is often used as a substitute for a subpoena as the process informing a witness of his duty to testify. We think it is better practice to issue a subpoena to a witness and the writ to the custodian, so that the witness may exercise whatever rights he might have to move to quash the subpoena. If no subpoena is served, it may be argued that the witness could contest the writ *ad testificandum* on any ground which would be available as to a subpoena. That question, of course, is not here.

[12] While the government did stipulate on oral argument that the appeal itself should be submitted to the court on the merits, that stipulation was made only to expedite the ap-

It is well established that, where one sovereign has custody of a prisoner, it may transfer him to another, and that this is a matter of comity between the sovereigns, as to which the prisoner has no standing to complain. *Ponzi* v. *Fessenden*, 258 U.S. 254, 260-262; see *United States ex rel. Buchalter* v. *Warden of Sing Sing Prison*, 141 F. 2d 259, 260 (C.A. 2) (where the Federal Government, which was the sovereign of prior jurisdiction, turned the relator over to the State of New York for electrocution). This principle has been applied even where the claim was made that the sovereign of prior jurisdiction had not consented to the physical taking of its prisoner (see, *e.g.*, *United States ex rel. Spellman* v. *Murphy*, 217 F. 2d 247, 252 (C.A. 7); *Rawls* v. *United States*, 166 F. 2d 532, 534 (C.A. 10), certiorari denied, 334 U.S. 848).

In *Ponzi* v. *Fessenden*, 258 U.S. 254, this Court unanimously held that the United States, acting through the Attorney General, was permitted to surrender a federal prisoner to the State of Massachusetts pursuant to a writ of *habeas corpus ad prosequendum*, issued out of the state court to the prisoner's federal custodians, and that when delivered up under such process the State of Massachusetts could lawfully prosecute the prisoner in its courts. Mr. Chief Justice Taft, speaking for the Court, stated (258 U.S. at 259-260):

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peal. It was not intended to be a waiver or abandonment of the standing argument. The motion to dismiss the petitioner's appeal, which included the standing argument, was submitted to the court below.

> One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. * * * Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

The Court held that the Attorney General was authorized to surrender temporary custody of a federal prisoner to a state for purposes of trial, and that confinement in the penitentiary does not make the prisoner immune from subsequent prosecution. These principles serve to establish lack of standing in this petitioner. Since the petitioner is not permitted to challenge the surrender of jurisdiction over him by the state (see *supra*, p. 31), it follows that he is not permitted to challenge the means (the writ) by which the state's surrender is obtained. The state is merely permitting the petitioner to carry out his separate, independent obligation to appear for federal trial. Whether the transfer from state to federal authority is effectuated by oral agreement, an informal document, or a writ *ad prosequendum*, the petitioner cannot challenge the transfer. There is

thus no reason why he should have standing to question a writ issued by the district court which the state authorities, to which it is addressed, are willing to honor.

The fact that the petitioner is in state prison ought not to give him greater rights than he would have if he were not in prison at all. If the petitioner were not in prison, he would be under a duty to appear in California. The fact that the state is willing to let him fulfill that duty is not a matter about which he can complain.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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